Office - Supreme Court, U. S.
FILED
MAY 3 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 744

THOMAS J. VANDYKE, *Petitioner*

versus

BLUEFIELD GAS COMPANY, a corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN SUPPORT INCORPORATED

FREDERICK T. KINGDON,
N. D. Trent Building,
Mullens, West Virginia.
Attorney for Petitioner

May 3rd, 1954

Mullens Advocate Print, Mullens, W. Va.

INDEX

	Page
OPINION	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
SPECIFICATIONS OF ERRORS TO BE URGED	7
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	16
APPENDIX	17

CITATIONS

CASES:	Pages (s) Cited
Addison vs Huron Stevedoring Co., (CA 2) 204 F. (2d) 88	15
Armour and Co. vs Wantock, 323 U. S. 126, 65 S. Ct. 165	8, 9, 11
Bell vs Porter, (CA 7) 159 F. (2d) 117, Cert. Granted 330 U. S. 817, Vacated 330 U. S. 813, Rehearing Denied 331 U. S. 864	9. 11
Bowers vs Remington Rand Co., (CA 7), 159 F. (2d) 114	9
Brooklyn Savings Bank vs O'Neil, 324 U. S. 697, 65 S. Ct. 895	12
Brown vs. Dunbar etc., (CA 2), 189 F. (2d) 871	15
Central Missouri Tel. Co. vs Conwell, (CA 8), 170 F. (2d) 641	8, 9, 15
Dumas vs King, (CA 8), 157 F. (2d) 463	10
Handler vs Thrasher, (CA 10), 191 F. (2d) 120	13
Howard vs Southern Bell Tel. Co., 72 F. Supp. 276	10
Kirschbaum vs Walling, 316 U. S. 517, 62 S. Ct. 1116	6, 14
Landaas vs Canister Co., (CA 3) 188 F. (2d) 768	16
Lassister vs Guy F. Atkinson Co., (CA 9) 176 F. (2d) 984	16
Missouri, K and T. Ry. Co. vs United States, 231 U. S. 112, 119, 34 S. Ct. 26, 27	8
Rokey and Day vs Zimmerman, (CA 8) 157 F. (2d) 734	9
Rothman vs Publicker Ind., (CA 3) 201 F. (2d) 618	15
Skidmore vs Swift and Co., 323 U. S. 134, 65 S. Ct. 161	8, 9, 11
Super-Cold Southwest Co. vs McBride, (CA 5) 124 F. (2d) 90	10
Tennessee Coal and Iron Co., vs Muscoda Local, 321 U. S. 590, 602, 64 S. Ct. 698, 705	12

Tripp vs May, (CA 7) 189 F. (2d) 198 15
Walton vs Southern Package Co.,
320 U. S. 540, 64 S. Ct. 320 6, 14

STATUTES:

Fair Labor Standards Act of 1938
(29 U. S. C. A. 201 et seq)
Section 6; (206) 2, 7, 8, 9, 10, 12, 13, 16
Section 7; (207) 2, 7, 8, 9, 10, 12, 13, 16
Section 11 (c); (211 (c)) 15
Section 15 (a) (5); (215 (a) (5)) 15
Section 16 (b); (216 (b)) 2, 6, 8, 12, 13, 14, 16, 17
Portal-to-Portal Act,
(29 U. S. C. A. 251, et seq)
Section 3 (253) 13, 17
Section 11 (260) 6, 8, 13, 14, 15, 16, 18

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. ————————

THOMAS J. VANDYKE, *Petitioner*

vs:

BLUEFIELD GAS COMPANY, *Respondent*

a corporation,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas J. VanDyke, prays that a writ of certiorari issue to review the judgment entered in this case on February 16th, 1954, by the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals (R. 95-99) is reported at 210 F. (2d) 620.

JURISDICTION

The judgment of the Court of Appeals was entered February 16th, 1954 (R. 99-100). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, (Act June 25th, 1948, c. 646, Sec. 1; 62 Stat. 928; 28 U. S. C. A. 1254 (1)).

STATUTES INVOLVED

The pertinent provisions of the *Fair Labor Standards Act of* 1938, as amended, (29 U. S. C. A. 201, et seq; Act June 25th, 1938, c. 676, 52 Stat. 1060, amended, Act October 26th, 1949, c. 736, 63 Stat. 910) and of the *Portal-to-Portal Act* (29 U. S. C. A. 251, et seq; Act May 14, 1947, c. 52; 61 Stat. 84) are set forth in the Appendix, infra, pp. 17-18.

QUESTIONS PRESENTED

1. Whether an employee of a gas company, in sole charge of the company's business during a fourteen hour period each night, but who is, in a portion of the period, permitted to sleep when convenient and when not actually engaged in the duty of watching for prowlers, and receiving and acting on telephone trouble reports and service requests, is entitled under provisions of the *Fair Labor Standards Act*, to compensation for all hours required to be spent on the premises.

2. Whether, in the event part of the hours in such employment required to be spent on the premises each night may be considered excluded noncompensable time, the employer's right to claim such exclusion is conditioned upon furnishing such employee safe, clean, comfortable and otherwise adequate sleeping facilities.

3. Whether, if such time is compensable as a matter of law because of employer's failure to furnish safe and adequate sleeping facilities, the failure of an employee to complain of, or protest, the lack of safe, clean, comfortable and otherwise adequate sleeping facilities may be taken as a waiver or release of his right to compensation for such hours.

4. Whether, in a case wherein liability is found under Sections 6 and 7 of the Act (29 U.S.C.A. 207), the employer's mere belief that it was not violating the Act is sufficient, under provisions of Section 11 of the *Portal-to-Portal Act* (29 U.S.C.A. 260), to justify the denial of the award of liquidated damages provided in Section 16 (b) of the Act (29 U. S. C. A. 216 (b)).

STATEMENT

This action was instituted by petitioner in the District Court for Southern West Virginia, to recover wages claimed to be due from respondent under provisions of the *Fair Labor Standards Act of* 1938, as amended (29 U.S.C.A. 201, et seq). Petitioner was employed by respondent during the period from August 11th, 1951 to April 15th, 1953.

Respondent is one of a group of commonly owned and controlled corporations which sell and distribute natural gas in the cities of Bluefield, West Virginia and Bluefield, Virginia, sell and deliver bottled gas in a larger territory of the two states, and sells, installs and services gas appliances in the same areas. Its natural gas is purchased, under authority of the Federal Power Commission from Amere Gas Utilities Company, which supplies respondent from wells located neither in West Virginia nor Virginia, (See Petitioner's Original and Supplemental Interrogatories and Answers thereto, made a part of the record below).

Petitioner was employed during the hours of 5:00 P. M. and 7:00 A. M. each night, seven days a week, or 98 hours per week, at a salary of $150.00 per month (or $34.61 per week). He was required to remain, during those hours, on the premises of respondent's service plant in Bluefield, West Virginia, to watch for and report disturbances and to wait for, receive, act on and relay telephoned reports of trouble or service requests relating to the business of respondent and all of its affiliated companies (R. 44-45), the service plant being the only place at which telephone communications at night, concerning all of the companies, were received (R. 44-45). Petitioner was alone and in sole charge during those hours. Respondent's report forms, and the evidence, indicate petitioner's duties to be that of night-watchman (R. 13; 28-29; 49-50; 15) but his principal duty was that of night telephone clerk or operator. While respondent admitted that petitioner's duties were the same, except for the volume of calls received after 10:00 P. M., during the entire night (R. 48-49), that petitioner was required to

stay, during the 14 hours each night, in the service plant (R. 44; 16; 20-21), and that petitioner's presence at the plant between the hours from 10:00 P. M. to 7:00 A. M. were essential and of benefit to the respondent's business, and of its affiliated enterprises, (R. 52-53), it intended to pay petitioner *only for his hours on duty from* 5:00 *P. M. to* 10:00 P. M. each night, or for 35 *hours* per week, for the weekly compensation of $34.61 (R. 48-49; 12; 50-52). Petitioner, a man 58 years of age, did not know what his pay was to be until he received his first pay check (R. 23-24) and thereafter asked for, but did not get, a raise in pay (R. 24; 44; 68). Petitioner testified, without dispute, that respondent once tried to increase his daily duty hours from fourteen to fifteen and one-half hours, without a change in pay, but on petitioner's objections, abandoned that plan (R. 23).

The Court found that petitioner was authorized to sleep when he desired after 10:00 P. M. each night (R. 93; 3) on an iron bed located near a wall telephone in a record and supply storage room in respondent's service plant.

Petitioner was able to get naps amounting, on average, in the five warm months, to not more than four hours per night (R. 21-22) and in the seven colder months, when room heat was necessary, to not more than three hours per night (R. 22), but seldom had any long periods after 10:00 P. M. of *uninterrupted or untroubled sleep* (R. 21-22)

Respondent assigned petitioner duty quarters, consisting of a 12x14 unkept, dirty storage room, off the main offices and shop rooms, filled full and high with old records and company equipment, in a small space of which was located an iron, flat-springed bed, on which was an uncovered dirty mattress, and an old-type manually operated, open flame, unvented gas burner, without pilot light and automatic safety controls, which, because of lack of space, was located not more than three feet from the bed (R. 16-20; 26; 29-40; 43; 54-55). A telephone was located on the wall near the bed. Old records, in boxes, were stacked so high, one window was blocked (R.

19; 33-34; 43). A room nearby had a wash bowl and commode, but the bath tub was disconnected (R. 17-18; 38-39). One witness, who had eight years experience repairing and installing gas appliances for respondent, testified that the heater, because open flamed, close to the bed, unvented and without automatic safety controls was dangerous for use in a room used for sleeping purposes (R. 35; 40-41). The gas code of the City of Bluefield proscribed the installation of such heaters in sleeping rooms (R. 41; 46-47; 57-58), and petitioner was afraid of it (R. 19; 21). Respondent's general manager testified that providing petitioner a *safe place to sleep* was not part of the employment agreement (R. 49).

Respondent says no sheets, blankets, or pillows were furnished because " that would create a problem in laundry and this and that" (R. 41-42) but plaintiff, in winter, used a blanket, and in summer, a light counterpane, brought from his home (R. 16-18; 30-31; 33-34) and furnished his own pillow (R. 18). Petitioner took naps at night fully dressed, except for removal of his shoes (R. 39; 20). Respondent's janitor was required to clean other rooms in the building *but not petitioner's duty room* (R. 54; 38; 45; 24), and it was constantly dirty (R. 30: 32, 42-43; 38; 54; 85).

A radio, belonging to another employee, was located in another room but could not be used in petitioner's duty room (R. 55; 17; 20). No cooking facilities were provided, petitioner usually eating at home or, on a few occasions, having his wife or daughter bring food to him at the plant.

During the period *after March,* 1952, as to which respondent *kept records* (R. 52-53), calls received and acted on by petitioner after 10:00 P. M. were not numerous. Because of system trouble, calls prior to March, 1952, received after 10:00 P. M., were somewhat more numerous (R.21). Petitioner was not paid for any duties performed after 10:00 P. M. or for more than thirty-five hours per week (R. 48-49; 25).

During the entire period of employment, petitioner

and other of respondent's employees, had telephones at home (R. 22-23; 31; 45-46), a fact known to respondent's general manager (R. 46). Petitioner never used any time on duty for the transaction of personal affairs.

Respondent, through testimony of an officer-stockholder, offered proof that it believed and concluded, from an alleged study made in 1951, that neither respondent nor petitioner were covered by the *Fair Labor Standards Act* (29 U. S. C. A. 201, et seq), being of the belief (1) *that respondent was not engaged in interstate commerce,* and (2) that petitioner's duties were not such as to make him a covered employee, even if the respondent were a covered employer (R. 58-60; 92-93). This officer could not recollect whether he had studied the decisions of this Court in *Kirschbaum vs Walling,* 316 U.S. 517, 62. S. Ct. 1116 and *Walton vs Southern Package Co.,* 320 U. S. 540, 64 S. Ct. 320 (R. 60).

Upon these facts the District Court found (1) that since petitioner was provided "with a room in which to sleep" and "a — *safe and comfortable bed* and other equipment,*and quarters,* on which to sleep", though "arrangements" were made by which *petitioner* was to provide his own bed clothing, petitioner was not entitled to compensation for six of the fourteen hours in each night which he ought to have slept, and was, therefore, entitled to judgment only for sixteen uncompensated hours per week in excess of the forty hour statutory maximum, and (2) that respondent's "good faith conclusion that the Wage and Hour Law did not apply" warranted a denial of any liquidated damage award provided by Section 16 (b) of the Act (29 U. S. C. A. 216 (b)), under Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260) (R. 2-7).

After overruling petitioner's motion to modify and review its findings (R. 1; 8-10), the District Court entered judgment for petitioner only for actual wages due, at overtime rate, for the hours in excess of forty hours and not exceeding fifty-six hours of each full ninety-eight hour week, amounting to $1,722.00, with costs and attorney fee, (R. 1-2).

Petitioner appealed, assigning as error the Court's refusal (1) to allow petitioner judgment for wages for the full ninety-eight hours per week required to be spent on respondent's premises, (2) to award liquidated damages upon the liability found, and (3) to award an reasonable attorney fee. Respondent did not appeal.

The Court of Appeals affirmed all the findings and conclusions reached by the District Court (R. 95-99), except the findings relating to the adequacy, comfort and safety of sleeping facilities furnished (R. 98). The Court, instead, apparently grounded its decision respecting respondent's failure to furnish safe, adequate and decent facilities upon petitioner's accession "without apparent protests" to the arrangement that he furnish his own bed clothes, and the fact that petitioner "never made any complaint—about the facilities given to him", such as the "lack of a bath tub,—the dangerous type of heater furnished and—the general dirtiness of the quarters" (R. 98).

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred:

1. In holding that six light duty, standby hours of the fourteen hours in each night that petitioner was required to be on duty in employment of this nature, on respondent's premises, are not compensable time under provisions of Section 6 and 7 of the *Fair Labor Standards Act* (29 U. S. C. A. 206 and 207), it has decided a question of importance in a manner in conflict with a decision of the Court of Appeals for the Eight Circuit, and contrary to the interests of justice.

2. In holding that, nothwithstanding respondent's failure to furnish petitioner safe, adequate and decent sleeping quarters, bedding and facilities, the six light duty, standby night hours, were not compensable time under the Act, it has decided a question of importance in a manner inconsistent with decisions of this Court, and contrary to the interests of justice.

3. In holding that petitioner's failure to complain of

the lack of safe, adequate and decent sleeping facilities constituted a waiver or release of petitioner's right under the Act, to compensation for six light duty, standby hours in each night, it has decided a question of importance in a manner inconsistent with a decision of this Court, in conflict with the holdings of other circuits, and contrary to the interests of justice.

4. In holding that respondent's showing of mere belief that it was not violating the provisions of Sections 6 and 7 of the Act (29 U.S.C.A. 206 and 207), warranted the denial of the liquidated damage award required by Section 16 (b) (29 U. S. C. A. 216 (b)), under provisions of Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260), it has decided an important question of Federal law in a manner in conflict with, and as to which there is confusion in, decisions of the Courts of Appeals of various circuits, state appellate and trial courts, and contrary to the interests of justice, and which has not been, but should be, settled by this Court.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court's holding that an employee whose duties require him to remain alone, on his employer's premises, in charge of its business for a fourteen hour period each night to watch for intruders and to wait for, receive and take action on gas system trouble reports and service requests is not entitled to compensation for that part of the time during which actual duties were light and in which he was authorized to rest, is erroneous, is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit, in *Central Missouri Tel. Co. vs Conwell,* (CA 8), 170 F. (2d) 641, and implicitly conflicts with this Court's holding in *Missouri, K. and T. Ry. Co. vs* U. S., 231 U. S. 112, 34 S. Ct. 26; *Skidmore vs Swift and Co.,* 323 U. S. 134, 65 S. Ct. 161; *Armour and Co. vs Wantock,* 323 U. S. 126, 65 S. Ct. 165, which hold that, except in the case of (a) twenty-four hour duty employees, as to which (b) the Administrator has promulgated regulations permitting exclusion of designated un-

interrupted sleeping time and (3) who were paid for duties performed during designated sleeping time, an employee who is *employed to wait* on an employer's premises, rather, than merely waiting to be employed, is entitled to compensation for the full number of hours required so to be spent exclusively for his employer's benefit.

This exception to the general rule of compensability under Section 6 and 7 of the Act (29 U. S. C. A. 206 and 207), which is applied to twenty-four hour duty employees, as to whom reasonable regulations respecting exclusion of permitted idle time designated for normal uninterrupted sleep were promulgated recognized in the *Wantock* and *Skidmore* cases, supra, and in the cases of *Bowers vs Remington Rand Co.,* (CA 7), 159 F. (2d) 114, *Rokey and Day vs Zimmerman,* (CA 8) 157 F. (2d) 734; and *Bell vs Porter,* (CA 7) 159 F. (2d) 117, all involving firemen, and applied by the Court below, is clearly not applicable to employees whose occupations and duties are not of closely similar nature. *Central Missouri Tel. Co. vs Conwell* (CA 8) 170 F. (2d) 641.

The Court of Appeals for the Eighth Circuit, which had previously applied the exception respecting firemen in *Rokey and Day vs Zimmerman,* supra, correctly distinguished it from the different situation presented with respect to eleven hour shift telephone operators in *Central Missouri Tel. Co. vs Conwell,* supra. Examination of the *Conwell* case will disclose a fact situation closely similar to that in this case. Indeed, if anything, the facts in this case warrant even more strongly the application of the general rule of total compensability than do those in the *Conwell* case, since petitioner (a) had additional guard duties (b) was *alone in sole charge of, and responsible for, respondent's utility system* and affiliated systems and enterprises the entire fourteen hours spent each night on the premises.

As in the *Conwell* case, petitioner was "required to be in (the service plant) ready to serve — rendered — necessary service for which (he) confessedly received no compensation (after 10 P. M.) — (and) was not there for

the purpose of sleep nor for any purpose of (his) own, but for (his) employer's benefit". And he was "charged with (*sole*) responsibility for — the (enterprises) under (his) charge". Clearly, the holding of the Court below conflicts with the right and just decision of the Court of Appeals of the Eighth Circuit, which applies the general rule of compensability, consonant with the clear purpose and intendment of Sections 6 and 7 of the *Fair Labor Standards Act.*

In *Dumas vs King,* (CA 8) 157 F.)2d) 463, 467, the same Court earlier recognized and applied the rationale of the *Wantock* and *Skidmore cases,* supra, that the principal test of compensability for idle time is whether the employee *is employed to wait on the premises of the employer.*

The cases of *Super-Cold Southwest Co. vs McBride,* (CA 5) 124 F. (2d) 90, and *Howard vs Southern Bell Tel. Co.,* 72 F. Supp. 276, cited by the Court below, are clearly distinguishable from the instant case because the employees in those cases *were not required to remain on the employer's premises.*

2. The Court's holding that petitioner must be considered to be *within the exception to the general rule* of full compensability for hours employees are employed to wait on the employer's premises, which has been *applied only to twenty-four hour duty employees such as firemen,* conflicts with the holding of this court implicitly conditioning exclusion of compensation for night duty hours upon (1) the employer furnishing safe, adequate and decent sleeping facilities and (2) compensating him for time within the designated sleeping period actually spent at work.

The Court of Appeals (R. 98), and the record, indicate only that respondent furnished petitioner "a room with a bed, heater and telephone", that *petitioner,* "without apparent protest" furnished "his own bed clothes" and that "it is quite significant that, —, (petitioner) never made any complaint to his employer about the facilities given to him" viz: *"the lack of a bath tub, — the dangerous*

The decision below apparently also conflicts with the recent decision of the Ninth Circuit in *General Electric Co. vs Porter,* (CA 9) 208 F. (2d) 805, Certiorari Denied April 26, 1954, 74 S. Ct. 676.

type of heater furnished, and — *the general dirtiness of the quarters*". That safe, adequate and decent sleeping facilities were not furnished petitioner is clear from the opinion below (R. 98) and the record.

The exclusion of compensation for hours of designated sleeping time, even in the case of twenty-four hour duty firemen as to whom the Administrator has made an exception by special regulations respecting idle time, is clearly conditioned upon the showing that the employer provided adequate, clean, safe and reasonably comfortable sleeping facilities in which to take a "normal night's sleep". *Skidmore vs Swift and Co.*, supra; *Armour and Co. vs Wantock*, supra.

The Court below cited *Bell vs Porter*, supra, in which sleeping time compensation was denied, as authority for the broad general proposition that this Court, in denying certiorari thereto (Cert. granted 330 U. S. 817, Vacated 330 U. S. 813, Rehearing denied 331 U. S. 864), "has upheld, however, the rule that sleeping time is not compensable", (R. 97). Not only is the denial of a writ by this Court not a "holding", but the facts in that case, *involving firemen* on twenty-four hour duty who are excepted from the general rule, and that the court below *"did not find* that sleeping quarters were inadequate or of such character — that — (the firemen were) unable to obtain normal rest" and that they were furnished "sleeping facilities, *bedding, clothes lockers, showers,* toilet facilities and *laundry service for bedding"*, supported the court's denial of compensation for sleeping time, and, being consistent with the decisions this Court, justified denial of the writ.

Consequently, the holding of the court below that, notwithstanding the respondent's failure to furnish petitioner safe and comfortable sleeping quarters and facilities, required as a condition of excluding designated sleeping time from hours ordinarily to be counted compensable under Section 6 and 7 of the act, even in the special class of firemen, conflicts with the holdings of this Court in *Skidmore vs Swift and Co.* and *Armour and Co. vs Wantock*, supra, which implicitly condition

or predicate the application of the exception to the general rule of compensability upon the employer's furnishing adequate sleeping facilities, and, if allowed to stand in a case such as this, would permit employers, simply by designating time as "sleeping time", to avoid compensating any and all types of employees required to remain on their premises at night.

3. The Court's holding that petitioner's failure to complain of the lack of safe, adequate and comfortable sleeping facilities, amounts to a waiver or release of his right to claim compensation for all idle night hours on the premises, conflicts with the holding of this Court in *Brooklyn Savings Bank vs O'Neil,* 324 U. S. 697, 65 S. Ct. 895, which proscribed the release by an employee of claims arising under Sections 6, 7 and 16 (b) of the Act (29 U. S. C. A. 206, 207 and 216 (b)).

The Court below, conceding that adequate facilities for sleeping were not provided, grounded its denial of compensation for the idle night hours upon petitioner's agreement, "without protests, to *furnish his own bedding*" and that he "never made any complaint to his employer" about the *"lack of a bath tub,* — the *dangerous type of heater* furnished, and — the *general dirtiness of the quarters"* (R. 98). In other words, the court below holds that petitioner, by agreement, inaction or failure to complain, waived or released his right to, or is estopped to claim, compensation for idle hours, in lieu of decent, safe and comfortable sleeping facilities. Even if the exception to the general rule of compensability for hours employed to wait on the employer's premises, applicable to firemen, is applicable to petitioner it is clear that an employer must either pay for such time or provide safe, comfortable and decent sleeping facilities. It follows that only if the right to compensation under Sections 6 and 7 of the Act can be waived or released, can the right to adequate sleeping facilities in lieu thereof be waived or released. See also *Tennessee Coal and Iron Co. vs Muscoda Local,* 321 U. S. 590, 602, 64 S. Ct. 698, 705.

This Court's holding in *Brooklyn Savings Bank vs O'Neil,* supra, prior to the passage of the *Portal-to*

Portal Act (29 U. S. C. A. 251, et seq), that an employee could not release or otherwise relinquish any benefit to which he was entitled under provisions of Section 6, 7 and 16 (b) of the *Fair Labor Standards Act* short of full payment was modified by Section 3 of the *Portal-to-Portal Act* (29 U. S. C. A. 253) only to the extent of validating express compromise settlements and releases affecting the right to "*liquidated damages* provided in Section 16 (b) of the *Fair Labor Standards Act* (29 U. S. C. A. 216 (b)). Moreover, the language of Section 3 (c), (29 U. S. C. A. 253 (c)) providing that "such compromise or waiver, —, shall, *according to the terms thereof,* be a complete satisfaction, — and bar —", clearly indicates that even with respect to the right to liquidated damages, an express written waiver or compromise instrument still is required.

In *Handler vs Thrasher,* (CA 10) 191 F. (2d) 120, decided in 1951, the principle of the *O'Neil* case was followed, the Court holding that even though the employee expressly agreed that he would not demand overtime pay, such an agreement being in contravention of Section 7 of the *Fair Labor Standards Act* (29 U. S. C. A. 207), was invalid and the employee "cannot be estopped by its provisions".

Since, therefore, implied waivers or releases of benefits of the Act, are not embraced in, or validated by, Section 3 of the *Portal-to-Portal Act* (29 U. S. C. A. 253), the rule announced by this Court in *Brooklyn Saving Bank vs O'Neil,* supra, is still subsisting law, as to which the holding of the Court below clearly conflicts.

4. The Court's holding that Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260) warranted the denial of liquidated damages provided under Section 16 (b) of the *Fair Labor Standards Act* (29 U. S. C. A. 216 (b)), equal to the wages found due under Sections 6 and 7 of the Act (29 U. S. C. A. 206 and 207), upon respondent's mere claim of good faith involves an important question of Federal law as to which there is confusion and conflict among the appellate courts, and which this Court has not, but should, decide.

Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260) provides that a court may "in its *sound* discretion" deny an award of liquidated damages provided under Section 16 (b) of the *Fair Labor Standards Act* (29 U. S. C. A. 216 (b)) if the "employer shows to the satisfaction of the court that the—omission—was in good faith *and* that he had reasonable grounds for believing that his—omission was not a violation—" of the Act.

The *trial court* found that liquidated damages should not be awarded because respondent "went into this matter and secured advice" of a person not a lawyer (R. 60) and "came to a good faith conclusion that the Wage Hour Act did not apply". (R. 7). *The court below* approved denial of liquidated damages only upon the testimony of an officer and stockholder of respondent, that he believed petitioner was not a covered employee (R. 98).

The only evidence offered in support of the Court's exercise of the discretion reposed in it by Section 11, was the testimony of this officer-stockholder of respondent that *he alone* (R. 60) made a study, in 1951, of petitioner's job and duties, and concluded (1) that the respondent, who buys its gas, by permission of the Federal Power Commission, from an interstate gas company, *distributing and selling it* through a connected system *in the two states of Virginia and West Virginia,* was not in interstate commerce and (2) that if in interstate commerce, the petitioner's duties did not make him a covered employee.

The respondent's first "conclusion" was obviously incredible, and, in view of this Court's clear and unambiguous holdings in the landmark employee-coverage cases of *Kirschbaum vs Walling,* 316 U. S. 517, 62 S. Ct. 1116 (1942) and *Walton vs Southern Package Co.,* 320 U. S. 540, 64 S. Ct. 320 (1944), the second "conclusion" is hardly more credible. Respondent's witness couldn't recollect whether he had studied either of those cases. (R. 60).

Since the good faith of respondent must be grounded upon this study of employee coverage, this officer (1)

either did not make a study which inevitably would have led to these decisions and, therefore, misled the trial court, or if he made the study, found the cases and, from them, must have known that the petitioner's employment clearly was covered or, at least, assumed the risk of error. In either event, respondent could not have acted in good faith, so that the trial court's finding, approved by the court below, that respondent has shown good faith, being without any support, constituted an abuse of the *sound* discretion reposed in the court.

Moreover, the statute requires a showing of employer's good faith *and reasonable ground* for belief in his innocence of violation of the Act. Consultation with one, not trained in law, and who "concluded nothing" (R. 60) is, as the Court of Appeals recognized, obviously not reasonable ground for belief in compliance with the *Fair Labor Standards Act.*

Furthermore, there is positive evidence of respondent's lack of good faith in its admission, that, for the period from August 11th, 1951 to March 15th, 1952, (R. 52; 11) it kept no records of petitioner's employment, in violation of Sections 11 (c) and 15 (a) (5), of the Act (29 U.S.C. A. 211 (c), 215 (a)(5)), and the showing that on January 19th, 1953, it attempted a ruse designed to prejudice petitioner's claim (R. 12; 50-52).

This Court has not yet had occasion to construe Section 11 of the *Portal-to-Portal Act* (29 U. S. C. A. 260), and there is general confusion respecting the strictness or liberality with which it is to be applied, among the decisions of the various appellate courts. Some decisions of appellate courts and trial courts, and of the court below, simply approve the denial or award of liquidated damages without serious consideration, which is establishing a general pattern reposing *absolute* discretion in trial courts, *Brown vs Dunbar,* (CA 2) 189 F. (2d) 871; *Central Missouri Tel. Co. vs Conwell,* (CA 8), supra; *Rothman vs Publicker Ind.,* (CA 3) 201 F. (2d) 618; *Addison vs Huron Stevedoring Corp.,* (CA 2) 204 F. (2d) 88; *Tripp vs May,* (CA 7), 189 F. (2d) 198 while others deal with the subject with varying degrees of

strictness, or apply different standards. *Lassiter vs Atkinson,* (CA 9) 176 F. (2d) 984; *Landaas vs Canister,* (CA 3) 188 F. (2d) 768.

If a trial court may deny award of liquidated damages merely on the assertion of an employer that he acted in good faith and that in his opinion he had reasonable grounds for believing in his innocence of violation of the Act the statutory "sound discretion" has been, or will soon be converted in practice, to "absolute discretion" leading to practical repeal of the liquidated damage provision (Section 16 (b)) of the *Fair Labor Standards Act,* which from its legislative history and terms, it is obvious was not the legislative object sought in the enactment of Section 11 of the *Portal-to-Portal Act.*

Moreover, since judgment for interest, ordinarily chargeable upon other liquidated contractual demands, is not permitted upon judgments for wages due under provisions of Sections 6 and 7 of the *Fair Labor Standards Act, Brooklyn Savings Bank vs O'Neil,* supra, liquidated damage awards under provisions of Section 16 (b) of the *Fair Labor Standards Act* should be denied, under provisions of Section 11 of the *Portal-to-Portal Act,* only upon strict and substantial proof supporting both of the statute's requirements of employer "good faith" and "reasonable ground".

Whether the Court below erred in approving the denial of the award of liquidated damages, and we contend that it did, or whether it was right, it is submitted that this Court should take this opportunity to furnish guidance and standards under which the "sound discretion" reposed by the statute should properly be exercised.

CONCLUSION

For any or all of the reasons stated, it is respectfully submitted that a writ of certiorari should be granted.

FREDERICK T. KINGDON,
Attorney for Petitioner

May 3rd, 1954.

APPENDIX

Section 16 (b), *Fair Labor Standards Act* of 1938, as amended (29 U. S. C. A. 216):

"(b). Any employer who violates the provisions of Section 6 or Section 7 of this Act (Sections 206 or 207 of this title) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in additional equal amount as liquidated damages.—".

Section 3, *Portal-to-Portal Act* (29 U. S. C. A. 253):

"(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, — may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; *except* that no such — cause of action may be so compromised to the extent that such compromise is *based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.*

* * * * *

(c) Any such compromise or waiver, —, shall *according to the terms thereof,* be a complete satisfaction — and — bar to any action —."

Section 11, *Portal-to-Portal Act* (29 U. S. C. A. 260):

"260. Liquidated Damages. — In any action commenced — to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938 —, *if the employer* shows to the satisfaction of the court that the — omission giving rise to such action was in *good faith and that he had reasonable grounds* for believing that his — omission was not a violation of (the Act), the court

may, in its sound discretion, award no liquidated damages or award (any amount less than) specified in Section 16 (b) of such Act."

10

FILED
JUN 1 1954
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1954

No. 744

THOMAS J. VAN DYKE, *Petitioner*

Vs.

BLUEFIELD GAS COMPANY, *Respondent*
a Corporation,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

LeROY KATZ,
Ritz Building
Bluefield, West Virginia
Attorney for Respondent

June 1, 1954

INDEX

	Page
TABLE OF AUTORITIES	ii
OPINION	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	5
CONCLUSION	12
APPENDIX	13-14

TABLE OF AUTHORITIES

	Pages Cited
1. Armour & Co. vs. Wantock, 323 U. S. 126, 65 S. C. 165, re-hearing denied, 65 S. C. 427,	6
2. Bell vs. Porter (C. A. 7) 159 F. (2nd) 117, Certiorari granted, 330 U. S. 817, vacated 330 U. S. 813, Rehearing denied 331 U. S. 864	7
3. Bowers v. Remington Rand Co. (C. A. 7) 159 Fed. 2nd 114, Certiorari denied, 330 U. S. 843, Rehearing denied 331 U. S. 854,	7
4. Bridgeman v. Ford, Bacon and Davis (C. A. 8) 161 Fed. 2nd 962,	8
5. Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895	10
6. Brown v. Dunbar, etc. (C. A. 2) 189 F. 2nd 871,	11
7. Central Missouri Telephone Co. v. Conwell (C. A. 8) 170 F. (2nd) 641,	6
8. Clougherty v. James Venor Co., (C. A. 6) 187 F. (2nd) 288, Certiorari denied, 342 U. S. 814,	11
9. General Electric Company v. Porter, 208 Fed. (2nd), 805 (C. A. 9), Certiorari denied, April 26, 1954	8
10. Handler v. Thrasher (C. A. 10) 191 F. (2nd) 120	10
11. Howard vs. Southern Continental Telephone 72 F. Supp. 276,	8
12. Kirschbaum vs. Walling, 316 U. S. 517, 62 S. Ct. 1116,	11
13. Landaas v. Canister (C. A. 3), 188 F. (2nd) 768	11
14. Rokey and Day vs. Zimmerman (C. A. 8) 323 U. S. 134, 65 S. C. 161,	6
15. Skidmore v. Swift & Co., 323 U. S. 134, 65 S. C. 161,	6
16. Tennessee Coal & Iron Co. v. Muscoda Local, 321 U. S. 590	10
17. Walton vs. Southern Package Co. 320 U. S. 540, 64 S. C. 320	11

STATUTES

Portal-to-Portal Act,	
29 U. S. C. A. 216,	10
29 U. S. C. A. 259,	11
29 U. S. C. A. 260,	10-12

RULES

Federal Rules of Civil Procedure	
Rule 52, as amended, 28 U. S. C. A.	11

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1954

THOMAS J. VAN DYKE, *Petitioner,*

vs:

BLUEFIELD GAS COMPANY, *Respondent.*

a Corporation,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your respondent, Bluefield Gas Company, a corporation, prays that the petition of Thomas J. Van Dyke, petitioner, for a writ of certiorari to review the judgment entered in this case on February 16, 1954, by the United States Court of Appeals for the Fourth Circuit be denied.

OPINION BELOW

The District Court did not file a written opinion but the findings of the court are found in transcript of the Record filed with this court by the petitioner as appendix to appellant's brief (R. 1-7). The opinion of the Circuit Court of Appeals (R. 95-99) is reported at 210 Fed. 2nd, 620.

JURISDICTION

The judgment of tthe Court of Appeals was entered February 16th, 1954 (R. 99-100). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, (Act June 25th, 1948, c. 646, Sec. 1; 62 Stat. 928; 28 U. S. C. A. 1254 (1)).

QUESTIONS PRESENTED

1. Whether an employee of a gas company who is employed at their service plant to answer emergency calls from customers and relay the calls to the service man during the night is entitled to compensation for sleeping time where interruptions of sleep were so few as to be almost non-existent.

2. Whether the sleeping facilities provided the petitioner can be declared inadequate after finding of fact by the trial court that said facilities were adequate, which finding was sustained by the Circuit Court of Appeals.

3. Whether the trial court has abused its discretion in disallowing liquidated damages where said court has made a finding that failure to pay said wages and overtime was in good faith and upon reasonable grounds for believing the omission was not a violation of the Act.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are presented in the appendix infra pages 13 - 14.

STATEMENT

The pertinent facts may be summarized as follows:

This action was instituted by Thomas J. Van Dyke, an employee of the Bluefield Gas Company, a corporation, to recover wages and over time which the petitioner claims was due him under the provisions of the *Fair Labor Standards Act of* 1938 *as amended* (29 *U. S. C. A.* 201 *et seq.*). Petitioner was employed from August 11, 1951, until April 14, 1953. The Bluefield Gas Company, the employer, is a locally owned

natural gas company providing natural gas service to the residents of Bluefield, West Virginia; a subsidiary of the Bluefield Gas Company, the Commonwealth Public Service Company, operates in the State of Virginia, but is a separate and distinct corporation. This corporation serves the residents of the town of Bluefield, Virginia.

All equipment used by said Gas Company is automatic and stations are provided in seven places throughout the city for the purpose of controlling the gas distribution in different parts of said city. One of these stations is located on the north side of Bluefield where the petitioner employee worked. The gas distribution equipment, however, at that particular place is identical with the gas equipment in other parts of Bluefield where no employees are located, as all equipment is automatic. At the northside service plant during the day time other employees of said company work on gas meters and other equipment used by the company. After 5 o'clock no work was performed at said plant.

The Company employed the petitioner to answer trouble calls from the customers. In August, 1951 the petitioner came to the defendant's business office located in the City of Bluefield and requested a job of the defendant corporation (R. 79). The respondent manager advised the petitioner that a man was needed to answer the telephone on trouble calls after 5 o'clock P. M. (R. 79). The petitioner advised tthe respondent's manager that he was a used car dealer and also performed work around his home and apartment buildings which he owned. This would necessitate his being free to work during the day time and he therefore requested the job of answering the telephone for emergency calls from 5 o'clock P. M. until 7 o'clock A. M. (R. 79). His only duties were to answer the telephone and if he heard any disturbances to call tthe police, but petitioner was to take no action himself and did not perform any other service. Upon receiving a trouble call from a customer the petitioner then called the service man and relayed the message to him. No further action was required. A salary of $150.00 per month was agreed upon. (R.85). *The petitioner had no supervisory, guard or other duties to perform. The petitioner was free to sleep at any time after* 10 *o'clock* (R. 80) and the respondent company furnished a bed, and a telephone was placed

at the bed so that in the event a phone call came through, the petitioner would not have to get out of bed to answer the phone. (R. 81). This phone was placed at his bed even though another phone was located in the same building in the next room. The evidence discloses that during the period of employment of 20 *months* during which time reports were made by the petitioner *only* 18 *telephone calls* were received by the petitioner between the hours of 10 o'clock in the evening and 7 o'clock the following morning. (R. 70).

The District Court found on the question of fact that the facilities furnished the petitioner by the respondent were adequate; that he was provided with a bed, toilet facilities, wash basin, and a radio was also located in the building. Heat was furnished by means of natural gas heaters, including heat in the bedroom and the *Circuit Court of Appeals sustained the finding of the District Court as to the adequate facilities furnished.*

Petitioner claimed that he was only able to get brief naps. However, respondent showed by evidence of a disinterested witness who lived in the same house as the petitioner, that he did not sleep at his home but in fact sold used cars during the day time and worked around his house and the apartment house owned by him. (R. 87). *The District Court made a finding of fact that petitioner did sleep on the respondent's premises, which finding was affirmed by the Court of Appeals.* By agreement with the petitioner he furnished his own bed clothes as the respondent company had no laundry facilities. Petitioner in interrogatories asserted that he had regular night watchman duties to perform, but abandoned such contentions upon a trial of the case and admitted that he performed no night watchman's duties, (.R 71) and in fact locked the door to said building and same remained locked throughout the night in the same manner as if he were in his own home. (R. 74-75)

The District Court found that the petitioner could and did have the opportunity to sleep uninterrupted for six hours each night and therefore deducted from his compensable hours six hours of sleeping time for which the petitioner was not to be paid. The court found the remaining hours on the job were compensable. An important feature in determining that the

petitioner had uninterrupted sleeping time was the fact that during the entire period of employment during which time reports were made to the defendant, only 18 telephone calls were received by the petitioner between the hours of 10 o'clock in the evening and 7 o'clock the following morning (R. 70). This number of phone calls can hardly be considered more unusual than an individual would receive in his own home during such a period of time.

The District Court likewise refused liquidated damages to this petitioner based upon the testimony of an officer of the company who was a stockholder and *also an attorney at law* that he had read the Wage and Hour Act and decisions pertinent thereto and had consulted with a labor relations expert in the area before arriving at the conclusion that a person in the position held by this particular employee was not covered by the Act. (R. 92). The Attorney who made the decision regarding coverage under the Act further testified that the job evaluation was made prior to the time this petitioner was employed (R. 93). The District Court thereupon found that the petitioner was entitled to wages for 8 hours a day out of the 14 or a total of 56 hours per week with overtime to be paid for all hours worked in excess of the 40 hour week, the 6 hours being deducted as sleeping time and held not compensable. The total amount of the judgment was $1722.00 plus costs and attorney's fees. Petitioner appealed to the Circuit Court of Appeals, sitting en banc, no appeal was taken by this respondent, and said court affirmed all of the findings and conclusions of the District Court. There was no dissent.

ARGUMENT

The judgment of the Circuit Court of Appeals is correct and is not in conflict with any other decision so as to warrant further review of the case by this court.

1. The petitioner contends that the Circuit Court of Appeals for the Fourth Circuit in sustaining the finding of the District Court that the petitioner was not entitled to compensation for the six hours of sleeping time, had decided said case in a manner in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit and has cited the case of the

Central Missouri Telephone Company v. Conwell, 170 *Fed. 2nd*, 641. The Conwell case is not in conflict with the decision of this court, as the facts and circumstances are different and are not pertinent to the present case decided by the Fourth Circuit.

In the Conwell case decided on November 16, 1948, the employee worked as a telephone switchboard operator in a telephone exchange. The employee worked from 9 o'clock P. M. to 8 o'clock A. M. and was paid for eight hours of the eleven hours. The balance of three hours was designated as sleeping time. Later this sleeping time was reduced to two hours. However, here the telephone exchange was located in a town with a population of 1800 people and with between 600 and 700 telephone patrons. Long distance calls also came through this switchboard during the night. The number of phone calls coming through the switchboard varied from time to time, and on many occasions the operators were interrupted frequently to handle these calls. The *District Court here had found that the sleeping time was compensable and the Circuit Court of Appeals did not overrule the question of fact found by the District Court.* The facts in said case regarding interruptions during the period allotted as sleeping time cannot be compared with the lack of interruptions in the present case which the record shows as 18 times in a period of almost two years. This same court was the court which decided the case of *Rokey & Day vs. Zimmerman*, 157 *Fed. 2nd*, 734, wherein the court held that sleeping time was not compensable because ample consecutive hours of sleep were permitted, and interruptions were infrequent. *The question of whether the interruptions are sufficient to prevent the getting of a night's sleep is a question of fact to be decided by the trial court, and that finding should be sustained.* The courts have held that it is impossible to lay down any arbitrary rule regarding sleeping time which may be compensable, and the determination of whether time so spent is or is not working time depends upon the facts of the particular case. *Armour and Company v. Wantock*, 323 *U. S.* 126, 65 *S. C.* 165, *rehearing denied*, 65 *S. C.* 427. *Skidmore v. Swift and Company* 323 *U. S.* 134, 65 *S. C.* 161. In the *Armour* case the District Court held that the usual hours for sleeping and eating would not be counted but that the remaining hours would be

counted. *The employees took no appeal from the judgment insofar as it was adverse to them.* The case thereupon rested in the Circuit Court of Appeals on the question of whether the time spent on the employer's premises *other than sleeping and eating time* would be compensable, *it being conceded that sleeping time was not compensable.* In the *Skidmore* case, cited above, again the question was presented as to how much of the time on the employer's premises was compensable. The Supreme Court in said case said that the *employees were very rarely interrupted in their normal sleeping and eating time and these were pursuits of a purely private nature which would presumably occupy the employees time whether they were on duty or not and thus this Court has held in said case that sleeping time when rarely interrupted is not compensable.* The remainder of the time on the premises the court held was compensable. Solicitor General Fahey who filed a brief as ameci curiae for the Government agreed that sleeping and eating time should be excluded, but that the remaining time on the premises should be held compensable.

The case of *Bell v. Porter*, 159 *Fed. 2nd* 117, *certiorari granted* 330 *U. S.* 817, *vacated* 330 *U. S.* 813, *rehearing denied* 331, *U. S.* 864, likewise held that sleeping time was not compensable, although the petitioner attempts to distinguish these cases because these men were firemen. *Bowers v. Remington Rand, D. C. Ill. F. Supp.* 620, *affd. C. A.* 159 *F. 2nd* 114, *Cert. Denied*, 330 *U. S.* 843, 67 *S. Ct.* 1083, *Rehearing Denied* 331 *U. S.* 854, 67 *S. Ct.* 1198, also held that sleeping time was not compensable. The petitioner has attempted to distinguish all of these cases from the present case on the ground that they all involve firemen on 24 hour duty jobs. However, the question decided is the same as in the present case, because sleeping time if uninterrupted is not compensable as heretofore held by this court. Whether a man is a fireman, a night watchman or a telephone operator would not differentiate or distinguish the case. The question decided was that if the hours of sleep were uninterrupted or rarely interrupted then the time was not compensable.

The petitioner likewise inferred that he was in sole charge of and responsible for the respondent's utility system during the time he was at work. This is not correct and is not shown

either by the evidence nor can it be implied. (R. 71). The man was not an engineer, was not trained in any way to operate any of the facilities of the company and all of the equipment was automatic, not requiring personal attention. No responsibility was placed on this petitioner to perform any job except to relay emergency trouble calls to the service man. (R. 71). In the case of *Bridgeman v. Ford, Bacon and Davis*, 161, *Fed. 2nd*, 962, the demand was made for payment for 8 hours sleeping time on the grounds that during this 8 hour period the employee was compelled to perform some tasks, such as checking the fire engines, sweeping out their dormitory and making up their beds. The time it took to perform these services ranged from an hour down to ten or twenty minutes. The court refused to allow compensation for any part of the 8 hour period and the Circuit Court held that the amount of work done by the employees was so small as to have made it possible for the District Court to have considered it as falling within the *de minimus* rule. The case of *Howard v. Southern Continental Telephone Company*, 72 *Fed. Supp.* 276, is further authority for the position taken by the respondent that sleeping time is not compensable even in the case of a night shift switchboard operator, where the operator was permitted to sleep in suitable sleeping facilities *and had consecutive hours of uninterrupted sleep each night*. The general rule, therefore, as laid down by this court is that sleeping time when uninterrupted or rarely interrupted is *not* compensable.

The petitioner by letter has cited an additional case, *General Electric Company v. Porter*, 208 *Fed. 2nd*, 805 (*C. A.* 9), *Certiorari denied, April* 26, 1954, in support of his claim that the decision of the Fourth Circuit in the present case is in conflict with said *General Electric v. Porter* case (this case was not originally cited in petitioner's brief). However, the *General Electric v. Porter* case is differentiated in the opinion, from the group of cases heretofore cited which hold that sleeping time is not compensable, because in the General Electric Company case the fireman were employed not only to protect the General Electric Company plant but *were also employed to protect two populous communities of some thirty thousand persons covering a wide area*. The court further stated, "*that the sleep allowed was a fitful one at best*, which might be said to have been with one eye open in anticipation of the moment

that they would be called upon to jump to the response of an alarm." The court further stated that the probability of an alarm at night where the firemen were protecting two communities was far greater than would have been involved in the protection of only the industrial plant. Therefore, this case is clearly distinguishable from the present case. The court in the *Ninth Circuit* did not contend that the law as set forth in the previous cases cited was wrong in denying compensation for sleeping time, but found that the facts in the General Electric Company case were clearly distinguishable.

2. The petitioner has contended in his brief that the Circuit Court of Appeals' decision in this case conceded that the facilities were inadequate as to comfort, safety, and other facilities. *This is an inaccurate statement of the Circuit Court of Appeals position on this point.* The Court of Appeals stated that "*the Record shows that appellant was furnished a room with a bed, heater and telephone; that he had the added facilities of a wash basin and toilet near by, and that he agreed without apparent protest to furnish his own bed clothes. We cannot say that such facts fall short of substantiating the District Court's finding of adequate facilities despite appellant's stress upon the lack of a bath tub, upon the dangerous type of heater furnished, and upon the general dirtiness of quarters. It is quite significant that, during the entire time of his employment, appellant never made any complaint to his employer about the facilities given to him.*" It is clear from a reading of this entire statement that the Circuit Court of Appeals *affirmed* the District Court in the position taken by said District Court that the facilities were adequate, *even though* the petitioner stressed the point that said facilities were inadequate. The District Court was the tryer of the facts in this case and the findings of said court that said facilities were adequate should not be disturbed. The Circuit Court of Appeals has refused to disturb this finding of fact and has agreed that said facilities as furnished were adequate.

The Circuit Court of Appeals does state in the opinion that it is significant that this petitioner made no complaints about the conditions and facilities given him, but said court has in no way held that this petitioner by inaction or failure to complain, has waived or released his right to, or was estopped from

claiming compensation for said sleeping time. The petitioner has attempted to disturb the decision of the Circuit Court of Appeals by contending that the Circuit Court of Appeals held that this petitioner had waived his rights to claim said compensation by his inaction and failure to complain. *The finding of fact by the District Court and sustained by the Circuit Court of Appeals was that the facilities furnished were adequate*, and *not* that the petitioner had waived his rights by virtue of his failure to complain of the facilities. The cases cited in the petitioner's brief, *Tennessee Coal and Iron Company v. Muscoda Local*, 321 *U. S.* 590, *and the case of Brooklyn Savings Bank v. O'Neil*, 324 *U. S.* 697 do not pertain to the matters involved in this case. Nor does the citation of the petitioner of the case of *Handler v. Thrasher* 191 *Fed. 2nd*, 120, apply in this case,*as a finding of fact that facilities were adequate was found by the District Court and sustained by the Circuit Court of Appeals.*

3. The petitioner likewise contends that the District Court's finding that the petitioner was not entitled to liquidated damages was improper. *Section* 11 *of the Portal to Portal Act*, 29 *U. S. C. A.* 260, provides, "If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in *good faith* and that he had *reasonable grounds* for believing that his act or omission was not a violation of the *Fair Labor Standards Act of* 1938 *as amended*, the Court may in its sound discretion, award no liquidated damages or award any amout thereof not to exceed the amount specified in Section 216 (b) of this title." The *Trial Court* found that the respondent had acted in *good faith and on reasonable grounds* for believing that the petitioner was not under the Act. In fact, the trial court after deciding the other questions involved in this case withheld decision for a time on the question of whether the petitioner was an employee covered by the Act. (R. 7).

The witness for the respondent, as heretofore stated, was an *attorney* and also consulted with a labor relations expert in the Bluefield area, said labor relations adviser having formerly been with the Wage and Hour Division of the Labor Department, and said attorney and officer studied the duties of this particular job before reaching the conclusion that said employee

was not a covered employee. (R. 92). The petitioner places great stress on the question presented to this witness as to whether or not said witness had read the cases of *Kirschbaum v. Walling*, 316 *U. S.* 517, and *Walton v. Southern Package Company*, 320 *U. S.* 540. The witness stated that he could not remember whether he had read these cases or not since his appraisal of this job had been made a year and a half or two years previous to the date of the suit. (R. 60).

It is interesting to note that in the *Kirschbaum* case Justice Frankfurter has stated that "to search for a dependable touchstone by which to determine whether employees are engaged in commerce or production of goods for commerce, is as rewarding as an attempt to square the circle", and Justice Roberts wrote the dissenting opinion in this case. *The Walton* case certainly does not fall within the facts of the present case as a determination of whether petitioner was a covered employee, as that case involved a night watchman who had to make regular rounds, punch a night watchman's clock, and the court through Justice Black laid great stress on the fact that reduced fire insurance premiums were conditioned upon the presence of a night watchman on the premises. None of these facts existed in the present case. *Landaas v. Canister*, 188 *Fed. 2nd*, 768, in upholding the refusal to grant liquidated damages says that it is not necessary to rely upon an administrative ruling in order to relieve an employer from liability for liquidated damages. The provisions of the Act, 29 *U. S. C. A.* 259, provides in effect that if an employer relies upon an administrative ruling the said reliance is a *complete defense. Section* 260, however, gives the court discretion as to liquidated damages and something less is sufficient for this purpose. *The court, as stated in this case, will not disturb the Trial Court's decision in refusing to allow liquidated damages unless same was clearly erroneous. Fed. Rules of Civil Procedure, Rule* 52, 28 *U. S. C. A.* The court further held that refusal to grant liquidated damages was within the trial court's discretion. *Brown v. Dunbar*, 189 *Fed. 2nd*, 871. In the case of *Clougherty v. James Venor Company*, 187 *Fed. 2nd*, 288, *certiorari denied*, 342 *U. S.* 814, the court held that the refusal of the District Court to grant liquidated damages did not constitute an abuse of discretion and the court said that "no circumstances of bad faith, malice, or oppression existed . . . . . we cannot say that this finding was manifestly erroneous."

Section 11 *of the Portal to Portal Act* 29 *U. S. C. A.* 260 leaves the question of liquidated damages to the discretion of the trial court and this discretion, although not absolute, cannot be disturbed unless said finding is manifestly erroneous. The District Court as the tryer of the facts is in a position to determine the good faith of the respondent employer and whether he acted upon reasonable grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LeROY KATZ,
Attorney for Respondent.

June 1, 1954.

APPENDIX

Section 16(b), *Fair Labor Standards Act* of 1938, as amended (29 U. S. C. A. 216):

> "(b). Any employer who violates the provisions of Section 6 or Section 7 of this Act (Sections 206 or 207 of this title) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional amount as liquidated damages.—".

Section 11, *Portal to Portal Act* (29 U. S. C. A. 260):

> "260. Liquidated Damages.—In any action commenced —to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938—, if the employer shows to the satisfaction of the court that the — omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his — omission was not a violation of (the Act), the court may, in its sound discretion, award no liquidated damages or award (any amount less than) specified in Section 16 (b) of such Act."

Rule 52, *Federal Rules of Civil Procedure as Amended.*

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Portal to Portal Act, 29 *U. S. C. A.* 259 (*a*)

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."